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# Showing what you're worth

## PREVAILING PARTY ATTORNEY-FEE MOTIONS – YOUR INVESTMENT IN YOURSELF

The jury just returned a verdict in favor of my client and justice prevails! Judgment is entered – as the prevailing party (see Code Civ. Proc., § 1032), it's time to ask the court to order the defendant to pay me for my work!

Wait, have I filed the [Proposed] Judgment? Has the court entered judgment? Has the clerk or I served notice of entry of judgment (Code Civ. Proc., § 664.5)? Yes? OK, clock's ticking, I should write my attorney fee motion!

Well, after I comb through the trial transcript and exhibits and contact and interview jurors to support my opposition to the defendant's motion for new trial (Code Civ. Proc., §§ 657, 659-662) . . . and motion for judgment notwithstanding the verdict (Code Civ. Proc., § 629) . . . and organize and file the Memorandum of Costs (Code Civ. Proc., §§ 1032, 1033.5) . . .

In the flurry of post-trial motions, it is obviously essential to focus on keeping the verdict. But put just as much effort into your motion for attorney fees – this is your investment in yourself. Writing a strong attorney fee motion will help the trial court justify its fee award, and make it more difficult to overturn in the court of appeal. This article focuses on statutory fee awards in California state courts, and assumes there is no dispute that your client is the prevailing party.

### The important public policy purpose of statutory attorney fees

"[P]rivately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions" but without "some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible." (*Baggett v. Gates* (1982) 32 Cal.3d 128, 142 [internal citation omitted].) The purpose of the statutory fee provision is to encourage attorneys to act as private attorneys general (PAGA) and to vindicate important rights affecting the public interest. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133-1134.)

To promote the underlying policy for the fee recovery, "fee awards should be fully compensatory." (*Ketchum*, *supra*, 24 Cal.4th at 1132.) Full compensation effectuates the aim of the fee-shifting statutes: "to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual . . . violation of specific . . . laws" by providing attorneys with "statutory assurance

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that, if they obtain a favorable result for their client, they will actually receive the reasonable attorney fees provided for by the Legislature . . . ." (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 583 [citing *Pennsylvania v. Del. Valley Citizens' Council* (1986) 478 U.S. 546, 565].) Thus, "an award of attorneys' fees is not a gift. It is just compensation for expenses actually incurred in vindicating a public right." (*Sundance v. Mun. Court* (1987) 192 Cal.App.3d 268, 273.)

Remind the court why the Legislature authorized attorney fees for your case. Set the tone at the outset of your motion – why this motion is an important use of the court's valuable time.

## Calculating the reasonable award begins with lodestar

***Lodestar = hours reasonably spent × reasonable hourly rate***

Determining the fee award begins with calculating the lodestar. The lodestar method calculates the baseline fees by multiplying the hours reasonably spent "by the hourly prevailing rate for private attorneys in the community conducting *noncontingent* litigation of the same type." (*Ketchum*, *supra*, 24 Cal.4th at 1133 [original italics].)

"Under the lodestar method, a party who qualifies for a fee should recover for all hours reasonably spent unless special circumstances would render an award unjust." (*Vo v. Las Virgenes Mun. Water Dist.* (2000) 79 Cal.App.4th 440, 446 [citing *Serrano v. Unruh* (1982) 32 Cal.3d 621, 632-633].) In assessing the reasonableness of the hours spent, "[t]he court can look to how many lawyers the other side utilized in similar situations as an indication of the effort required." (*Donahue v. Donahue* (2010) 182 Cal.App.4th 259, 272 [citation omitted].)

In addition, time spent relating solely to the fee award is also compensable. (*Ketchum*, *supra*, 24 Cal.4th at 1133.) Thus, "the attorney who takes [a fee-shifting] case can anticipate receiving full compensation for every hour spent litigating a claim . . . ." (*Beaty v. BET Holdings, Inc.* (9th Cir. 2000) 222 F.3d 607, 612 [emphasis added; quotations and citation omitted].)

Hourly rates are determined by "the range of reasonable rates charged by and judicially awarded comparable attorneys for comparable work." (*Children's Hosp. & Med. Ctr. v. Bontá* (2002) 97 Cal.App.4th 740, 783; see also, *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 997 [stating courts may consider "fees customarily charged by that attorney and others in the community for similar work."].) Counsel's actual hourly rate is strong presumptive evidence of the reasonableness of that rate. (*Mandel v. Lackner* (1979) 92 Cal.App.3d 747, 761 ["The value of an attorney's time generally is reflected in his normal billing rate."].)

If your client could not find local counsel, it is an abuse of discretion for the trial court not to consider the prevailing rates in your home market. (*Horsford v. Bd. of Trustees of Cal. State Univ.* (2005) 132 Cal.App.4th 359, 399.) "When a plaintiff needs to hire out-of-town counsel, a trial court must consider counsel's 'home market rate' when setting the hourly rate, rather than the local market rate." (*Caldera v. Department of Corrections & Rehabilitation* (2020) 48 Cal.App.5th 601, 609.)

How do you know what the reasonable hourly rate is? Talk to your colleagues; review cases in which fee awards were contested and upheld in your market. If you really want to get fancy, you can hire an expert to support your request.

## The enhancement/multiplier

The court next considers enhancing the lodestar to reflect the fair market value of legal services provided on a contingency basis. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) The California Supreme Court identified several factors the court may consider in setting the enhancement, including: "(1) the novelty and difficulty of the questions involved, and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; [and] (3) the contingent nature of the fee award . . . ." (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49.)

The court may also consider other factors, including the results obtained and whether a party continues to litigate after a reasonable settlement offer. (*Greene v. Dillingham Constr. N.A.* (2002) 101 Cal.App.4th 418, 426-427 [teaching the trial court has discretion to consider a variety of factors, including the results obtained]; *Meister v. Regents of Univ. of Cal.* (1998) 67 Cal.App.4th 437, 452 [finding trial court may consider that a party continued to litigate after a reasonable, albeit informal, settlement offer].) In addition, when an attorney's hourly rate is in the low range of the community standard, the trial court may increase the lodestar. (See *Donovan v. Poway Unified School Dist.* (2008) 167 Cal.App.4th 567, 627-628 [finding the trial court had discretion to add 0.25 lodestar multiplier when rate was "in the low range of fair and reasonable"].)

***Novelty and difficulty***

The California Supreme Court repeatedly affirmed this factor as one supporting a fee enhancement. (See, e.g., *Serrano v. Priest*, *supra*, 20 Cal.3d at 49; *Serrano v. Unruh*, *supra*, 32 Cal.3d at 625 n. 6; *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 320 n. 8; *Ketchum*, *supra*, 24 Cal.4th at 1122.) Explain to the court what made the case difficult – were there novel legal issues? What about the case made it particularly challenging?

***Contingent nature of the work***

How many of your clients can afford a $10,000 retainer and pay $500+ per hour, out-of-pocket, during the pendency of the litigation? How many people can work for years, dedicating hundreds and even thousands of hours to the job, without pay, but still keep a roof over their heads, food on the table, and make payroll to support their employees and their families?

These are rhetorical but important questions when considering access to justice and vindicating important public policies. For many corporate defendants, litigation is a cost of doing business. Many

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individual plaintiffs, however, have no access to justice if they cannot find an attorney to enforce their civil rights. As contingency fee lawyers for people, we only get paid when we obtain some kind of compensation for them, loaning them our professional services until they can afford to pay.

In short, this inquiry is designed to entice competent counsel to undertake difficult public interest cases. (*San Bernardino Valley Audubon Society v. County of San Bernardino* (1984) 155 Cal.App.3d 738, 755.) "The experience of the marketplace indicates that lawyers generally will not provide legal representation on a contingent basis unless they receive a premium for taking that risk." (*Ketchum*, *supra*, 24 Cal.4th at 1136 [citation omitted].) "[T]he unadorned lodestar reflects the general local hourly rate for a fee-bearing case; it does not include any compensation for contingent risk." (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1252.) "The purpose of [the lodestar] adjustment is to fix a fee at the fair market value for the particular action." (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 579 [quoting *Ketchum*, *supra*, 24 Cal.4th at 1132].)

> It has long been recognized [] that the contingent and deferred nature of the fee award in a civil rights or other case with statutory attorney fees *requires* that the fee be adjusted in some manner to reflect the fact that the fair market value of legal services provided on that basis is greater than the equivalent noncontingent hourly rate.

(*Horsford*, *supra*, 132 Cal.App.4th at 394-395 [citing *Ketchum*, *supra*, 24 Cal.4th at 1132-1133; emphasis added].)

"In cases involving the enforcement of statutory rights, 'such fee enhancements may make such cases economically feasible to competent private attorneys.'" (*Taylor*, *supra*, 222 Cal.App.4th at 1252 [quoting *Ctr. for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 899] [internal citation omitted].)

> [T]he market value of the services provided . . . must take into consideration that any compensation has been deferred . . . from the time an hourly fee attorney would begin collecting fees from his or her client; that the demands of the present case substantially precluded other work during that extended [deferral] period, which makes the ultimate risk of not obtaining fees all the greater . . . ; and that a failure to fully compensate for the enormous risk in bringing even a wholly meritorious case would effectively immunize large or politically powerful defendants from being held to answer for constitutional deprivations [or deprivations of statutory rights], resulting in harm to the public.

(*Horsford*, *supra*, 132 Cal.App.4th at 399-400.)

> A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans. A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases.

(*Graham*, *supra*, 34 Cal.4th at 579-580 [internal citations and quotations omitted].)

The delay in receipt of payment also supports adjusting the lodestar. As *Graham* recognized, "[c]ourt-awarded fees normally are received long after the legal services are rendered. That delay can present cash-flow problems for the attorneys." (*Id.*, at 583-584.) In fact, failing to account for the contingent risk in determining the application of a multiplier is reversible error. (*Greene*, *supra*, 101 Cal.App.4th at 426.)

***Other factors***

The other factors listed above – results obtained, continuing to litigate after reasonable settlement offers, low range of reasonable hourly rate in the lodestar – are not exhaustive. Invest in yourself and do the research to find the best opinions for the circumstances of your case.

Applying these factors, courts have awarded enhancements ranging from 2.0 to 4.0, or even higher – even in non-contingency cases. (See, e.g., *Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 224, 255 [recognizing that "[m]ultipliers can range from 2 to 4 or even higher"] [overruled on other grounds in *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260, 270]); *City of Oakland v. Oakland Raiders* (1988) 203 Cal.App.3d 78, 82 [2.34 multiplier in noncontingent case]; *Crommie v. Cal. Pub. Util. Comm'n* (N.D. Cal. 1994) 840 F.Supp. 719, 726 [applying 2.0 multiplier in FEHA case].)

Thus, the trial court does not "abuse its discretion simply by awarding fees in an amount higher, even very much higher, than the damages awarded, where successful litigation causes 'conduct which the [statute] was enacted to deter and [to be] exposed and corrected.'" (*Beaty*, *supra*, 222 F.3d at 612-613 [quoting *Vo*, *supra*, 79 Cal.App.4th at 445].)

## Combatting the usual defenses

***Defense: You didn't win every battle.***

Prevailing parties are not required to win every motion in the litigation to recover fees for their efforts. "[As] a practical matter, it is impossible for an attorney to determine before starting work on a potentially meritorious legal theory whether it will or will not be accepted by a court." (*Sundance*, *supra*, 192 Cal.App.3d at 273.) "Litigation often involves a succession of attacks upon an opponent's case; indeed, the final ground of resolution may only become clear after a series of unsuccessful attacks. Compensation is ordinarily warranted even for unsuccessful forays."

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(*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1303.)

> 'Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.' The process of litigation is often more a matter of flail than flair; if the criteria of section 1021.5 are met the prevailing flailer is entitled to an award of attorney fees.

(*Ibid.* [citing *Hensley v. Eckerhart* (1983) 461 U.S. 424, 435, fn. omitted]; see also, *Tipton-Whittingham v. City of Los Angeles* (2004) 34 Cal.4th 604, 610 [looking to cases interpreting Code of Civil Procedure section 1021.5 in assessing fee motions under FEHA].)

> It must be remembered that an award of attorneys' fees is not a gift. It is *just compensation* for expenses actually incurred in vindicating a public right. To reduce the attorneys' fees of a successful party because [she] did not prevail on all [her] arguments, makes it the attorney, and not the defendant, who pays the cost of enforcing that public right.

(*Sundance*, *supra*, 192 Cal.App.3d at p. 273 [emphasis added].)

To undermine this defense, remind the court that "flair" is not required – the defendant, not the attorney, should pay the cost of enforcing an important civil right. On the other hand, if the defense has a valid point, offer to agree to that reduction. Remember, your fee request must be reasonable. Show the court you are reasonable.

***Pro tip*:** I may reduce or exclude certain work from my original request if I anticipate the defense may contest the work as unreasonable. For example, I filed a writ that was (unsurprisingly) rejected by the court of appeal, as most writs are. I did not submit hours for that work in my original attorney fee motion; when the defense claimed my time on the underlying motion was unreasonable, I could explain the rationale for my failed strategy in the reply, and point out to the court that I already excluded it from my hours – in other words, I am a reasonable "flailer."

***Defense: Your fee request is unreasonable and should be reduced or denied.***

Defendants often claim that the case was over-litigated – too many hours on an issue, over-staffed with too many attorneys, inefficient, duplicative, not relevant, etc. Such broad strokes are inadequate. "General arguments that fees claimed are excessive, duplicative, or unrelated do not suffice." (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564; *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 61 [party challenging lodestar must offer a "reasoned argument explaining where the court went wrong"].)

The defense may also claim your request is so unreasonable that the trial court should deny attorney fees entirely.

> A fee request that appears unreasonably inflated constitutes a special circumstance permitting the trial court to deny or significantly reduce a fee award. 'If . . . the Court were required to award a reasonable fee when an outrageously unreasonable one has been asked for, claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to what they should have asked in the first place. To discourage such greed, a severer reaction is needful. . . .'

(*Serrano v. Unruh*, *supra*, 32 Cal.3d at 635 [citation for quote omitted]; see also, *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 989-991 [accord].)

Be strategic in your initial request. Don't overreach – foreclose these arguments in your moving papers so when the defense makes them in opposition, the court is convinced that the defense is overreaching, not you.

***Defense: Awarding a positive multiplier is double counting.***

The defense may argue that the attorneys' skill and the difficulty of the case cannot contribute to both a lodestar and an enhancement. Recall that the lodestar equals the hourly rate multiplied by the number of hours spent. Thus, a skilled attorney commands a higher hourly rate, and a difficult case requires more hours, both of which are already factored into the lodestar. Double counting is improper. (*Ketchum*, *supra*, 24 Cal.4th at 1138-1139.) But,

> [a]n enhancement is proper [ ] when these factors, though partially reflected in the lodestar, are not *fully* reflected in the lodestar, such as when the attorney displays an extraordinary level of skill that justifies a higher fee or when the particular difficulties of the case require not just more time but more talent, expertise, and quality. The factors may overlap in a general sense, but an enhancement focuses on something *extra*.

(*Sonoma Land Trust v. Thompson* (2021) 63 Cal.App.5th 978, 877 [original italics].)

***Defense: You didn't keep detailed billing records.***

For attorneys who practice in areas providing for statutory attorney fees, the best practice is to contemporaneously track your time to the nearest 0.1 minute. But sometimes, technology fails. If your billing software ate your records, all is not lost!

"In California, an attorney need not submit contemporaneous time records to recover attorney fees . . . ." (*Martino v. Denevi* (1986) 182 Cal.App.3d 553, 559.) An attorney's sworn testimony is sufficient, even in the absence of detailed time records. (*Glendora Community Redevelopment Agency v. Demeter* (1984) 144 Cal.App.3d 465, 470-471.) "The law is clear [] that an award of attorney fees may be based on counsel's declarations, without production of detailed time records." (*Raining Data Corp. v. Barrenechea* (2009) 175 Cal.App.4th 1363, 1375; see also, *Mardirossian & Associates, Inc. v. Ersoff* (2007) 153 Cal.App.4th 257, 269-271 [accord].)

In *Margolin v. Regional Planning Committee* (1982) 134 Cal.App.3d 999, 1006, the Second District court of appeal upheld an award of attorney fees based on sworn time estimates of the attorneys,

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without contemporaneous billing records. The trial court found:

> The work of Ms. Lewis is described in the Belin declaration, page two, *et seq*. Although no time records were kept for her the 120 hours estimated for her work seems reasonable and the court accepts it. The total time of 305 hours spent by her and three law clerks appear reasonable and the court accepts said statement of time spent.

(*Id*., at 1007.)

The appellate court upheld the trial court's determination that the estimated hours were sufficient evidence upon which to base the attorney fee award. (*Ibid*.)

Similarly, in *Raining Data Corp*., *supra*, 175 Cal.App.4th at 1375, the Fourth appellate district upheld an attorney fee award where no billing statements were submitted. The attorney declarations did not provide any basis for determining how much time was spent by any one attorney on any particular claims; rather, the declarations broadly described the work provided. (*Ibid*.)

## Nuts and bolts of attorney fee motions

"The experienced trial judge is the best judge of the value of professional services rendered in his court . . . ." (*Serrano v. Priest*, *supra*, 20 Cal.3d at 49 [internal quotation and citation omitted].) A robust attorney fee motion will show the trial court why the requested value of your time is reasonable, and should include: (1) a well-researched and drafted motion; (2) declarations from trial counsel in support, with pertinent exhibits; and (3) declarations from other attorneys or an expert supporting the reasonableness of the requested hourly rates in the community.

***The motion***

The motion should summarize the facts contained in trial counsel's declaration, and show the court why your fee request is reasonable. The memorandum of my attorney's fees motion generally contains: (1) a summary of the argument; (2) procedural summary; (3) summary of fees sought; (4) a discussion of the lodestar method and its application; (5) a discussion of the lodestar enhancement/multiplier and its application; and (6) conclusion.

I also like to include a table clearly laying out the fees for the work performed, broken down by pre-judgment and post-judgment fee requests. The hours are divided into pre- and post-judgment work because I generally do not ask for a multiplier on post-judgment fees, in the spirit of showing the court that my fee request is reasonable. But depending on your defendant – how quickly will they pay the judgment, whether they are going to appeal – you may decide not to break down the fees by pre- and post-judgment work.

***Trial counsel declarations***

These declarations must be robust, particularly if you suspect your fee award will go on appeal – either by the defense or if you cross-appeal. My declaration is divided into four parts:

(1) the procedural history, including the discovery propounded by all parties down to the number of interrogatories, production requests, and depositions; all motion work; any other proceedings; settlement negotiations; and a recap of the pre-trial and trial proceedings. While this may seem excessive for the trial court, remember, you may be writing for the court of appeal. And, if you happen to go up on appeal, you may not have the same trial judge if you have to return. Having one authoritative source for the case history will help you show any jurist that your fees were hard won.

(2) qualifications: describe your education, background, training, and experience. Don't be shy – show the court why you are worth your fee. Include not only your education and professional experience, but also any professional recognition or awards you received, attorney leadership positions you've held, and legal publications or presentations.

(3) the lodestar calculations: this section sets out the facts needed to support the lodestar section in the motion – the reasonableness of the hourly rates of all attorneys seeking fees and the reasonableness of the hours sought.

(4) the importance of full compensation: This section lays out the facts for enhancing the lodestar because of the important public rights vindicated and the contingent nature of the professional services.

I save a template copy of my declaration in my files. Every time I publish an article, speak at a conference, or receive some other professional recognition, I update the template so when the time comes, that part of my declaration is ready.

***Supporting declarations***

Declarations from other accomplished attorneys in your home market will support your fee request. Like any other piece of evidence, the attorney declarations should lay a foundation for their opinions and conclusions. And, like any other expert opinion, garbage in, garbage out. Draft your declaration early enough to send to your colleagues so they can see just how hard you worked and why your request is reasonable.

***Timing***

A motion for attorney's fees must be served and filed within the time for filing a notice of appeal. (Cal. Rules of Court, rule 3.1702(b)(1).) Thus, in most cases, the time to file a motion for attorney's fees is 60 days after notice of entry of judgment or 180 days after judgment – whichever is earliest. (See Cal. Rules of Court, rule 8.104(a).) The parties may stipulate to extend the deadline up to another 60 days if a notice of appeal has not yet been filed and the original period has not yet expired. (Cal. Rules of Court, rule 3.1702(b)(2)(A).) If a notice of appeal has been filed, the parties may stipulate to extend the period until the time within which a memorandum of costs must be served and filed under rule 8.278(c). (Cal. Rules of Court, rule 3.1702(b)(2)(B).) Shorter

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extension periods apply to limited civil cases. You may not want to stipulate to having the attorney fee motion heard after the appeal – your trial judge may be assigned to another department by the time a remittitur issues.

As lawyers, we are duty-bound to be zealous advocates for our clients. Your attorney fee motion is your investment in you – be your own zealous, but reasonable, advocate.

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